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Stuart L. Deutsch

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ANTITRUST CHALLENGES TO LOCAL ZONING AND OTHER LAND USE CONTROLS

STUART L. DEUTSCH*

Especially for lawyers who have concentrated on the areas of law traditionally relevant to local government practice, the last few years have been a shock because of the reduction in the local government exemption against antitrust attacks, and because of the appearance of many antitrust cases filed against local governments.

For many lawyers, antitrust law has an almost mystical quality. It involves economics and charts and graphs and division of markets and all sorts of things that most lawyers are not very comfortable doing. With trebled damages, judgments are sometimes in the hundreds of millions of dollars, and can even reach the billions, as in the case involving the *MCI* judgment against American Telephone and Telegraph Company.¹ Although the 1.8 billion dollar *MCI* judgment has been reversed,² even much smaller antitrust recoveries can present impressive numbers especially for a city with 10,000 or 100,000 or even 3,000,000 residents.

From the viewpoint of a defendant city and its attorney, it is terrifying to be confronted with potential liability of any significant amount from a new area of law. Probably more important than the possible liability, which is unlikely to occur in the land use regulation area and which this article will argue should only rarely occur,³ is the potentially substantial cost of defending an antitrust action. Defending antitrust suits can cost a city thousands of dollars per month in legal fees and costs.⁴ Paying large defense costs can be devastating to a city's budget, even assuming a successful ultimate outcome.

Another reason why city officials are upset is that people occasion-

* B.A., University of Michigan; J.D., Yale University; LL.M., Harvard University. Professor of Law and Co-Director, Program on Energy and the Environment, IIT/Chicago-Kent College of Law.

1. *MCI Communications Corp. v. American Tel. & Tel. Co.*, 708 F.2d 1081 (7th Cir. 1983).

2. *Id.*

3. See *infra* text accompanying notes 96-110.

4. For example, the City of Richmond spent about \$800,000 in legal fees in the first sixteen months of its defense of *Richmond Hilton Assoc. v. City of Richmond* 81-1100R (E.D. Va. 1981), an average of \$50,000 per month. See 5 NATIONAL LAW JOURNAL 1, 20 (1983). See 690 F.2d 1086 (8th Cir. 1982) and *Hanky v. City of Richmond*, 532 F. Supp. 1298 (E.D. Va. 1982) for collateral opinions in this lawsuit.

ally go to jail for antitrust violations. Of course, in the Chicago area and elsewhere, local government officials sometimes go to jail for lots of reasons. But who needs another risk of that sort?

From the plaintiff's point of view the antitrust law is mystical for opposite reasons. An antitrust victory offers glory to both the attorney and the successful plaintiff. For the attorney it offers a chance for a high percentage fee of a large recovery. For the potential developer, the threat of an antitrust suit offers enormous leverage with a once arrogant and uncooperative local government, now cringing and cowering before the applicant's onslaught. If the applicant's attorney threatens to sue in antitrust, the local government might even let the client do what she wants to do: get rezoning to build an office building or a shopping center, open a bar, get a franchise or a city contract.

To analyze the antitrust law changes as they affect local governments, this article is divided into three parts. The first part reviews the sharp reduction in the state action exemption from the antitrust laws for local government units. The second part of the article is an analysis of the zoning and land use related antitrust suits which have been or are presently in litigation. The third part of the article will argue that local governments should only rarely be found liable under the antitrust laws as a result of land use regulation, either when the municipality is acting as a developer or when the actions of the municipality are taken for the benefit of government officials or particular individuals, rather than taken for the health, safety or general welfare of the community. The usual treble damages remedy for antitrust liability against local governments should only be assessed when punitive damages are justified because the local government is acting for the benefit of government officials or particular individuals.

PART I

Reduction of the Antitrust Exemption

In order to explore the present day erosion of the antitrust exemption for local governments, it is necessary to analyze *Parker v. Brown*,⁵ the United States Supreme Court decision which established the state action exemption.

In *Parker*, the Supreme Court announced the state government action exemption from the antitrust laws. More specifically, the Supreme Court held that a legislative command from a state legislature was not

5. 317 U.S. 341 (1943).

covered by the Sherman Act, even if it commanded private parties as well as public officials to act, and even if the action would have been illegal if carried out by the private parties acting alone.⁶ The court held that the Sherman Act would not be interpreted to nullify a state's control over its officers and agents, or to prevent official action directed by the state. However, a state cannot give antitrust immunity to private parties by declaring their acts to be lawful.⁷ In the only reference to local governments, the Court stated that its analysis does not decide the question of "the state or its municipality becoming a participant in a private agreement or combination by others for restraint of trade."⁸

Thus, *Parker v. Brown* established that there is not complete immunity from the antitrust laws for cities if there is municipal participation in a private agreement. Nothing in *Parker* explicitly exempted local governments from the antitrust laws, although the courts for many years acted as if there had been such an explicit exemption.

After three decades of not dealing with the issue, during the 1970's the United States Supreme Court began to look at and narrow the state action exemption that arose with *Parker*. The initial cases dealt with the actions of state agents. For example, in *Goldfarb v. Virginia State Bar*,⁹ the Supreme Court held that the state bar could not enforce a county bar association minimum fee schedule. The "classic price fixing" established in the fee schedule was held not to be exempt because fee setting actions were not directed by the state acting as a sovereign. In *Cantor v. Detroit Edison Company*,¹⁰ a private utility furnishing light bulbs under the rate schedule adopted by the Michigan Public Service Commission was not exempt under the antitrust laws despite the strong state involvement with the light bulb service of the private utility. On the other hand, in *Bates v. State Bar of Arizona*,¹¹ the anti-advertising rules of the Arizona State Bar were voided on free speech grounds but were found not to be attackable under the antitrust laws. The Supreme Court held that the state constitution specifically authorized disciplinary rules and made the Arizona Supreme Court "the ultimate body wielding the State's power over the practice of law."¹² Thus the advertising rules were established directly by the state and fit within the exemption for state action.

6. *Id.* at 350-52.

7. *Id.* at 351.

8. *Id.* at 351-52.

9. 421 U.S. 773 (1975), *reh'g denied*, 423 U.S. 886 (1976).

10. 428 U.S. 579 (1976).

11. 433 U.S. 350 (1977), *reh'g denied*, 434 U.S. 881 (1977).

12. *Id.* at 360.

The net impact of these cases was to continue the existence of a state action exemption from the antitrust laws, but to narrow its scope regarding agencies not clearly part of the main core of state government. The state legislature and state supreme court are clearly part of that core, but not just anyone with a state label can qualify for the exemption. In dicta only did these opinions define the application of the antitrust exemption for cities.

Thus, while unpleasant for cities, the Court was not inconsistent with previous decisions when it decided *City of Lafayette v. Louisiana Light and Power Company*¹³ in 1978. In *Lafayette*, five members of the Court voted to find that the antitrust exemption did not apply to the particular situation concerning the activities of a city owned utility company. The Court stated that the antitrust laws could in fact apply to many situations concerning local governments. Although there is no majority opinion for much of the decision, in the part of the opinion where there is a majority, the Court found that the term "persons" in the antitrust laws embraces cities and states.¹⁴ The antitrust laws apply to municipalities unless there is an overriding public policy which negates such application. The Supreme Court in effect established a presumption that local governments will be subject to the antitrust laws. One must find a specific policy to negate the coverage.

Further, finding that Congress intended antitrust laws to be comprehensive, the Court found that there is a presumption against any exemption or override of the antitrust laws except in three situations: where there is explicit language to the contrary in the statutes of Congress, where the *Noerr-Pennington* doctrine comes into play¹⁵ and where the *Parker v. Brown* exemption is applicable.¹⁶

However, the *Lafayette* Court did not read the decision in *Parker* expansively. The Court found that it is not anomalous to apply federal laws to local governments, even those federal laws with criminal or civil penalties.¹⁷ The Court found that the antitrust laws are intended to protect the public from all abuses of economic power, and stated that

13. 435 U.S. 389 (1978).

14. *Id.* at 395.

15. See *Eastern Railroad Presidents Conference v. Noerr Motor Freight, Inc.*, 365 U.S. 127 (1968); *United Mineworkers of America v. Pennington*, 381 U.S. 657 (1965). The *Noerr-Pennington* doctrine holds that "regardless of anticompetitive purpose or intent, a concerted effort by persons to influence lawmakers to enact legislation beneficial to themselves or detrimental to competitors was not within the scope of the antitrust laws." *City of Lafayette v. Louisiana Light & Power Co.*, 435 U.S. 389, 399 (1978).

16. See *supra* text accompanying notes 5-8.

17. 435 U.S. at 400-01. However, the court declined to hold that traditional antitrust remedies would necessarily be appropriate against municipalities. *Id.* at 402.

"economic choices made by public corporations in the conduct of their business affairs. . . are not inherently more likely to comport with the broader interests of national economic well-being than are those of private corporation. . . ." ¹⁸ Moreover, the Court rejected any argument that the political process governs and controls the acts of cities and, therefore, the antitrust laws should not apply.¹⁹ The Court expressed doubt that the political process genuinely can work to protect injured people, especially those who come from outside the city and may be affected by the city's anti-competitive activity.

For the majority in *Lafayette*, the most important factor influencing its decision was the policy of Congress to mandate competition as the "polestar by which all must be guided in ordering their business affairs."²⁰ For the Supreme Court, competition is the economic order of the United States. Local governments are seen by the Court as participating in and affecting the economic life of the United States, as fully capable of aggrandizing and injuring other economic units with which they interrelate, and as having a potential of seriously distorting the rational and efficient allocation of resources.²¹ A critical concern of the Court was that "[i]f municipalities were free to make economic choices counselled solely by their own parochial interests and without regard to their anticompetitive effects, a serious chink in the armor of antitrust protection would be introduced at odds with the comprehensive national policy Congress established."²² Thus, for the Supreme Court majority, a local government is merely another economic actor with no special status, likely to act as badly, unfairly and illegally as any private entity regulated by the antitrust laws.

The remainder of the *Lafayette* opinion is a plurality opinion, worth reviewing because its test has been followed in later cases.²³ The plurality opinion rejected any city exemption based on the fact that the city has the status of being a government entity or state subdivision. Instead, the opinion created a test which requires that the city's conduct be an act of government by the state as a sovereign, or an act of a state

18. *Id.* at 403.

19. The Supreme Court has accepted arguments that local political processes show a devotion to democracy and should be presumed capable of protecting the public interest and private interests. *See James v. Valtierra*, 402 U.S. 137 (1971) (rezoning to allow subsidized housing subject to referendum); and *City of Eastlake v. Forest City Enterprises*, 426 U.S. 668 (1976) (city charter provision requiring 55% affirmative vote to approve rezoning of land).

20. 435 U.S. at 406.

21. *Id.* at 408.

22. *Id.*

23. *See, e.g., California Retail Liquor Dealers Assoc. v. Midcal Aluminum Co.*, 445 U.S. 97 (1980); *New Motor Vehicle Board of California v. Orrin W. Fox Co.*, 439 U.S. 96 (1978).

subdivision. Also, the conduct must be pursuant to a state policy to displace competition with regulation or monopoly public service. Finally, the city's actions must have been directed by the state; municipal preferences are not sufficient to provide an exemption. Indeed, the opinion hints that a neutral state policy will not be enough to protect a city's activities. This latter idea is the key to *Community Communications Company v. City of Boulder*,²⁴ as will soon be analyzed.²⁵

Although state direction is needed, the plurality opinion in *Lafayette* does say that a specific detailed legislative authorization is not needed. Instead, legislative authority to operate in an area is needed, and evidence that the legislature contemplated the kind of action complained of has to be provided. Thus, while state direction is needed, a detailed state code is not required for the city to be exempt from anti-trust laws.²⁶

In 1982, the Court showed that it was serious about extending anti-trust coverage to local governments despite the split nature of the *Lafayette* opinion.²⁷ Boulder is a home rule city operating under an extensive constitutional grant of home rule power from the Colorado Constitution. In *Community Communications Company v. City of Boulder*²⁸ the city was sued by its cable TV franchisee for imposing a three month moratorium on any extension of the cable system. During the three month period the city expected to consider a new cable TV policy and whether to invite competitive bidding for extending cable service to the rest of the city. The moratorium was defended by the city on the grounds that expansion by the plaintiff during the planning period would reduce the possibility of competitive bidding in unserved areas of Boulder.²⁹

The majority held that Boulder's moratorium was subject to attack under the antitrust laws. It found that the *Lafayette* test, as it had been developed through other cases,³⁰ meant that for a city to be exempt from the antitrust laws the anti-competitive practices must constitute either the acts of a state itself in its sovereign capacity or acts of the municipality to further or implement a clearly articulated and affirmatively expressed state policy.³¹ The Court held that a general grant of

24. 455 U.S. 40 (1982).

25. See *infra* text accompanying notes 28-33.

26. 435 U.S. at 415.

27. See *Community Communications Company v. City of Boulder*, 455 U.S. 40 (1982).

28. *Id.*

29. *Id.* at 45-46.

30. See *supra* note 23.

31. Further, there may be a second part of the test, that the municipality's acts must be sub-

home rule power, while authorizing cable TV regulation by Boulder, did not make the Boulder actions the act of the state as a sovereign.

In addition, a general grant of home rule power does not satisfy the "clear articulation and affirmative expression" of policy required for exemption.³² According to the Court in *City of Boulder*, it could not be inferred from the legislative history or the constitutional language that Colorado contemplated that Boulder would take anti-competitive action. Nor was it clear that the state expected that the city would act in an anti-competitive way. Moreover, the state did not command the city to act in an anti-competitive way. The Court found that the Colorado Constitution was neutral on the activities of the City of Boulder and certainly had not mandated such activities. The result of such neutrality was that the shield of antitrust exemption would not be available because pro-competitive and anti-competitive activities and policies could equally be pursued by a local government.³³

The three person dissent argued that the issue to be analyzed was really a question of preemption of local government power by federal statutes under the Supremacy Clause. The dissent found that there was no preemptive intent in the antitrust acts.³⁴ The three dissenters also argued that home ruled municipalities must be allowed to undertake economic regulatory actions within their sphere of power and should not be forced to return power to the state in order to be exempt from the antitrust laws.

To summarize what appears to be the test today, the majority of the Supreme Court recognizes the existence of a limited antitrust exemption for local governments. However, exemption exists only where the municipality acts to further or implement a clearly articulated and affirmatively expressed state policy. The exemption may also require that the municipality be subject to active state supervision. It is clear that today the antitrust exposure of local governments is greater than it was before *City of Lafayette* and *City of Boulder*. It is important to note, however, that in neither case did the Court find actual antitrust liability for the local government. According to the decisions, a cause

ject to active state supervision. The court in *Boulder* did not reach the issue of whether active state supervision would be required before the exception for a local government would arise. See 455 U.S. at 51. n.14. But, the *Midcal* decision, *supra* note 23, establishes such a requirement where a private party is the defendant. The lower courts generally hold that no active state supervision is needed where the defendant is a public entity. See *Town of Hallie v. City of Eau Claire*, 700 F.2d 376 (7th Cir. 1983) at 383-385 and *Central Iowa Refuse System v. Des Moines Metro Solid Waste Agency*, 715 F.2d 419 (8th Cir. 1983) at 428. But see text *infra* at pp. 75-76.

32. 455 U.S. at 55.

33. *Id.* at 55-56.

34. *Id.* at 68-69.

of action had been stated by the plaintiff, and a city could not interpose a claim of exemption from the antitrust acts because of its status. Neither case tells us what the appropriate remedies will be if a city is found to be liable in antitrust, nor whether damages, attorney's fees or costs will be assessed against the city in amounts equivalent to those that winning plaintiffs in antitrust cases normally are granted.

PART II

Recent Lower Court Cases Challenging Land Use Decisions as Violations of the Antitrust Laws

Reduction by the Supreme Court in the antitrust exemption for local governments has resulted in the filing of more than fifty antitrust cases against local governments, challenging a wide variety of actions.³⁵

35. A list of cases prepared for the National Institute of Municipal Law Offices, distributed by Robert J. Logan, City Attorney, San Jose, California and Chairman of NIMLO's Committee on Antitrust Law and Municipalities (undated, but distributed in 1982), lists 44 cases divided into the following areas: cable television regulation (six cases), land use and zoning (nine cases), waste collection and disposal (two cases), hospital and ambulance services (two cases), water and sewage systems (four cases), airport services and concessions (six cases), utility services (four cases), towing services (three cases), mass transit (one case), licenses and concessions (one case), land leasing (one case) and contracts (one case). Since at least five additional land use and zoning cases, and many other cases have been filed since 1982, the total is now well over 50 cases.

This article does not attempt to analyze the full development of antitrust doctrines in all topic areas. For discussions of various aspects of the antitrust/local government issues not covered in this article, see Levin, *The Antitrust Challenge to Local Government Protection of the Central Business District*, 55 UNIV. OF COLORADO L. REV. 21 (1983); Freilich, Donovan and Ralls, *Antitrust Liability and Preemption of Authority: Trends and Developments in Urban, State and Local Government Law*, 15 URBAN LAWYER 705 (1983); Comment, *Municipal Government Exemption from Federal Antitrust Laws*, 40 WASH. AND LEE L. REV. 143 (1983); Casenote, *Municipalities' Increased Susceptibility to Antitrust Liability: Community Communications Co. v. City of Boulder*, 24 BOSTON COLLEGE L. REV. 1399 (1983); Conant, *The Supremacy Clause and State Economic Controls: The Antitrust Maze*, 10 HASTINGS CONST. L.Q. 255 (1983); James, *Municipal Defenses to Antitrust Liability*, 6 UNIV. OF ARK. AT LITTLE ROCK L.J. 273 (1983); Lester, *Municipal Antitrust Liability After Boulder*, 36 OKLA. L. REV. 827 (1983); Pauerstein, *Affiliated Capital Corp. v. City of Houston: Local Governments and Antitrust Immunity*, 35 BAYLOR L. REV. 791 (1983); Note, *Recent Development-Municipalities and the Antitrust Laws: Home Rule Authority is Insufficient to Ensure State Action Immunity*, 35 VAND. L. REV. 1041 (1982); Comment, *Alternative Approaches to Municipal Antitrust Liability*, 11 FORDHAM URB. L.J. 51 (1982); Hartford, *Antitrust and Zoning — How Much Respect for Local Government?*, 22 SANTA CLARA L. REV. 901 (1982); Antitrust Symposium: *Municipal Antitrust Liability*, 1980 ARIZ. ST. L.J. 245-431 (1980); Note, *Antitrust Law-Municipal Immunity-Application of the State Action Doctrine to Municipalities*, 1979 WIS. L. REV. 570; Note, *The Application of Antitrust Laws to Municipal Activities*, 79 COLUM. L. REV. 518 (1979); Payne, *Recent Changes in Federal Law — Antitrust and Zoning*, 10 REAL EST. L.J. 146 (1982); Rose, *Municipal Activities and the Antitrust Laws After City of Lafayette*, 57 U. DET. J. URB. L. 482 (1980); Areeda, *Antitrust Immunity for "State Action" After Lafayette*, 95 HARV. L. REV. 435 (1981); Comment, *Antitrust Laws, Zoning and Agreements to Zone: Delegation of Police Powers After Lafayette v. Louisiana Power & Light*, 25 S. DAK. L. REV. 314 (1981); Note, *Municipal Liability For Refusing to Zone for Outlying Development*, 59 WASH. U. L.Q. 485 (1981); Note, *State Action-Home Rule Municipality's Ordinances Not Exempt from Sherman Act*, 12 SETON HALL. L. REV. 835 (1982).

This part will not analyze all of the cases but will look at a series of land use related cases.

Before looking specifically at the antitrust challenges, it is important to review some "black letter" zoning principles. Zoning enabling acts do not authorize the use of zoning ordinances to control competition as a direct purpose or goal of a zoning ordinance.³⁶ As a result, when the state courts read an ordinance as trying to directly control competition, the ordinance is routinely voided at the state level on pure zoning grounds.³⁷ However, zoning, by its very nature, by establishing limited uses and by creating the basic division of uses into residential, commercial and other zones, affects competition and often even creates monopolies without violating standard zoning doctrines.³⁸ Some cases have held that a refusal to rezone for additional uses, such as a new shopping center or other commercial use, was valid under zoning laws because of the need to preserve the economic health of the community or under the general welfare aspect of the police power.³⁹

Until very recently, the challenges to zoning and land use ordinances have been couched in traditional zoning and police power terms. They have not included antitrust challenges, just as they have not included other federal claims such as Section 1983 challenges.⁴⁰ It is possible that an ordinance which is valid as a zoning or land use ordinance will be found to violate the antitrust laws.⁴¹ However, while it may be theoretically possible for a zoning ordinance to be both valid and a violation of the antitrust laws, this article will argue that there should not be many cases where the combination actually occurs.⁴²

In order to analyze why valid police power ordinances should rarely, if ever, be found to be antitrust violations, it will be helpful to analyze the existing federal antitrust attacks on local land use decisions. Of the land use related cases this article will analyze, eight cases relate

36. 1 R. ANDERSON, *AMERICAN LAW OF ZONING*, 2D. § 7.28 (1977) [hereinafter cited as R. ANDERSON]; D. MANDELKER, *LAND USE LAW* § 5.29 (1982) [hereinafter cited as D. MANDELKER]. See also Levin, *supra*, at 71-76.

37. 1 R. ANDERSON, *supra* note 35, § 7.28; D. MANDELKER, *supra* note 35, § 5.29.

38. D. MANDELKER, *supra* note 35, §§ 5.32, 5.33.

39. *Id.*

40. The leading work on § 1983 liability is S. NAHMOD, *CIVIL RIGHTS AND CIVIL LIBERTIES LITIGATION: A GUIDE TO § 1983* (1979 & Supp. 1982). See chapter six for an analysis of local government liability, especially § 6.07 and § 6.08. Examples of § 1983 challenges to zoning and land use activities of local governments include *Gordon v. City of Warren*, 579 F.2d 386 (6th Cir. 1978), and *Hernandez v. City of Lafayette*, 643 F.2d 1188 (5th Cir.) *reh'g denied*, 649 F.2d 336 (5th Cir. 1981), *cert. denied*, 102 S. Ct. 1251 (1982).

41. See *Whitworth v. Perkins*, 559 F.2d 378 (5th Cir. 1977), *vacated and remanded*, 435 U.S. 992 (1978), *opin. reinstated*, 576 F.2d 696 (5th Cir. 1978), where the Fifth Circuit Court of Appeals held that a valid zoning ordinance could violate the antitrust laws.

42. See *infra* text accompanying notes 96-110.

to land rezoning, four are urban redevelopment project cases, one concerns a city's aggressive attempt to try to block the development of a shopping center competitive with its new downtown center by using federal and state environmental statutes, and by filing actions with federal and state administrative agencies, and several others deal with capital improvement controls used to control land development.⁴³

A. Zoning Decisions

Three of the rezoning cases deal with essentially identical circumstances.⁴⁴ A developer hopes to develop a shopping center. Either the developer is refused the rezoning needed to construct the shopping center or, after successfully applying for rezoning, a developer discovers that a competitor has also been granted rezoning. The plaintiff developer claims that there is an antitrust violation in either the refusal to rezone or in the granting of rezoning to the competitor.

As a zoning case, this type of case is quite common.⁴⁵ Proponents of a large new commercial center often are turned down for rezoning. The developer challenges the decision on grounds relating to master planning,⁴⁶ spot zoning issues,⁴⁷ due process issues,⁴⁸ and other grounds.⁴⁹ What makes the antitrust cases different is the same element that makes a § 1983 or a federal "taking" case different. The plaintiff wants not just its rezoning or to block its competitor's rezoning, but also substantial damages. For example, in *Scott v. City of Sioux City*,⁵⁰

43. For a general analysis of the use of capital improvement controls as land use control devices, see Deutsch, *Capital Improvement Controls as Land Use Control Devices*, 9 ENVIRONMENTAL LAW 61 (1978).

44. *Scott v. City of Sioux City*, 1983-1 Trade Cas. ¶ 65,352 (N.D. Iowa 1983); *Westborough Mall v. City of Cape Girardeau*, 1982-2 Trade Cas. ¶ 64,931 (E.D. Mo. 1981) *aff'd in part and rev'd in part*, 693 F.2d 733 (8th Cir. 1982); *Mason City Center Assoc. v. City of Mason City*, 468 F. Supp. 737 (N.D. Iowa 1979), *aff'd in part*, 671 F.2d 1146 (8th Cir. 1982).

45. See, e.g., *Ensign Bickford Realty Corp. v. City Council of Livermore*, 68 Cal. App. 3d 467, 137 Cal. Rptr. 304 (1977); *Forte v. Borough of Tenafly*, 106 N.J. Super. 346, 255 A.2d 804 (1969). See generally, ELLICKSON AND TARLOCK, *LAND USE CONTROLS: CASES AND MATERIALS*, 83-85 (1981) [hereinafter cited as ELLICKSON & TARLOCK]; Weaver and Duerksen, *Central Business District Planning and the Control of Outlying Shopping Centers*, 14 URB. L. ANN. 57 (1977); D. MANDELKER *supra* note 35, §§ 5.29-5.33.

46. See D. MANDELKER, *supra* note 35, at 57-64. See also Mandelker, *The Role of the Local Comprehensive Plan in Land Use Regulation*, 74 MICH. L. REV. 899 (1976).

47. Spot zoning means the singling out of a parcel of land for treatment different from that given to surrounding parcels. For an analysis of spot zoning see ELLICKSON AND TARLOCK, *supra* note 43 at 241-44.

48. See ELLICKSON AND TARLOCK, *supra* note 43 at 63-75, 79-86, & 281-313.

49. Other grounds can include improper fiscal purposes and interference with first amendment rights. See, e.g., *Mindel v. Township Council of Township of Franklin*, 167 N.J. Super. 461, 400 A.2d 1244 (1979); *Young v. American Mini-Theatres, Inc.*, 427 U.S. 50 (1976), *reh'g denied*, 429 U.S. 873 (1976).

50. 1983-1 Trade Cas. ¶ 65,362 (N.D. Iowa 1983).

the disappointed prospective developer sued a small city for fifteen million dollars in damages.⁵¹ In *Westborough Mall v. The City of Cape Girardeau*,⁵² plaintiffs asked for \$180 million because a competitor's land was also rezoned for a shopping center. In *Mason City Center Associates v. The City of Mason City*,⁵³ no specific dollar amount was requested but the plaintiffs alleged that they had lost approximately fourteen million dollars as a result of the city's actions, an amount which would be trebled under traditional antitrust law.

Both *Mason City* and *Westborough Mall* are cases to be analyzed in detail. *Mason City* will be analyzed first. *Mason City* is one of only two cases involving municipal land use control and antitrust in which there has actually been a trial.⁵⁴

Mason City Associates hoped to develop a shopping center approximately three miles from downtown Mason City. The city refused to rezone the proposed development site from agriculture to the appropriate business district. The plaintiffs alleged that the city, the city council members, and the developers of a downtown shopping center presently under development and strongly supported by the city had combined and conspired to unreasonably restrain trade, had created an illegal group boycott and had illegally attempted to monopolize the relevant shopping center market.⁵⁵

Among the improper activities alleged by the plaintiffs was a claim that the city and the downtown center developer had entered into a contract which provided that the city would not rezone any land to allow a shopping center in competition with the downtown center. Further, plaintiffs alleged that the city had executed a written contract with the downtown center developer which in effect gave the developer a veto over rezoning to commercialize any land in the city. The city promised not to rezone any land in conflict with the comprehensive plan which called for only a downtown shopping center in Mason City.

In 1979, after *City of Lafayette*, but before *City of Boulder*, the district court held that the plaintiffs had stated a cause of action. The court rejected a *Parker v. Brown* exemption claim. Using the test stated

51. In 1980, the population of Sioux City, Iowa was 82,003 according to the United States Census.

52. 1982-2 Trade Cas. ¶ 64,931 (E.D. Mo. 1981), *aff'd in part and rev'd in part*, 693 F.2d 733 (8th Cir. 1982).

53. 468 F. Supp. 737 (N.D. Iowa 1979), *aff'd in part*, 671 F.2d 1146 (8th Cir. 1982).

54. The trial in *Mason City* was held in 1981. See *Mason City Center Assoc. v. City of Mason City*, 671 F.2d 1146 (8th Cir. 1982). The other case is *Unity Ventures v. County of Lake*, No. 81 C2745 (N.D. Ill. 1984), in which trial was held in January, 1984.

55. *Mason City Center Assoc. v. City of Mason City*, 468 F. Supp. at 737 (N.D. Iowa 1979).

in *Lafayette*, the court found that the Iowa Zoning Enabling Act⁵⁶ did not reflect a policy to displace competition with regulation or monopoly service, and that Iowa did not require a monopoly or clearly articulate an anti-competitive policy. At most, Iowa law was neutral concerning anti-competitive land use planning by its cities. Finally, the district court found that local zoning was not actively supervised by the state of Iowa.⁵⁷ Thus, the district court found that on every prong of the *Lafayette* test, Mason City lost, and did not qualify for an exemption from the antitrust laws.

The defendants also contended that no antitrust cause of action was stated because of the right to petition government exemption reflected in the *Noerr-Pennington* doctrine.⁵⁸ The defendants claimed that the developer exercised its free speech rights to convince the city not to rezone. The district court held that attempts to secure or block legislation are quite different from entering into a contract to prevent competition and block plaintiff's meaningful access to zoning procedures and mechanisms. The court held that whenever there is a municipality/developer contract, there is no longer a free speech or right to petition issue. Instead, there is an act which could violate the antitrust laws. The court ordered the case to proceed on the merits, and the case promptly went to trial.

A jury trial was held in 1981 and the jury found no liability under the antitrust laws. At the trial, all the members of the city council testified.⁵⁹ They explained that they had voted to deny the rezoning because they felt that the downtown area rather than an outlying area should be developed, and that downtown development was better and healthier for the city. The city officials also testified that they voted to deny the rezoning because the comprehensive plan, which had been revised in 1965 long before this controversy, had called for a downtown shopping center and no outlying shopping center. They testified that the contract had not entered into their consideration of whether to vote against the rezoning.

The city had counterclaimed against plaintiffs, claiming that the antitrust action was an intentional interference with the business relationship between the city and the downtown developer. The city asked

56. IOWA CODE § 414 (1981).

57. 468 F. Supp. at 743.

58. See *supra* note 15.

59. Testimony by city officials concerning their motives for voting is rare. See Ely, *Legislative and Administrative Motivation in Constitutional Law*, 79 YALE L.J. 1205 (1970); Brest, *Palmer v. Thompson: An Approach to the Problem of Unconstitutional Legislative Motive*, 1971 SUP. CT. REV. 95.

for more than one million dollars in damages. The jury found in favor of the city on the counterclaim and granted a quarter of a million dollars in damages against the plaintiff, as well as attorneys' fees.⁶⁰

The Eighth Circuit Court of Appeals upheld the jury decision of no liability, agreeing that the defendant's officials testimony could be relied upon by the jury. However, the court reversed the counterclaim award, finding that the award reflected highly speculative damages to the city and hence was unsupportable under Iowa law.⁶¹ The award against the plaintiffs for attorneys' fees was also reversed.

Mason City thus supports the ability of a rejected developer to challenge local zoning decisions but shows that the right to sue does not necessarily mean the ability to prevail. However, neither is a counterclaim by a city likely to be successful. Because *Mason City* was acting as a regulator and not as a developer or for the benefit of specific individuals, the result of no liability is consistent with the proposals made in Part III of this article. Further, since *Mason City* was not alleged to be a marketplace actor, or acting corruptly, the city should have been granted an exemption from the antitrust laws and should not have been forced to trial.⁶²

*Westborough Mall v. City of Cape Girardeau*⁶³ is a suit by one potential shopping center developer against the city which rezoned a second parcel for a competitive center. Apparently, everyone agreed that only one center could be sustained in the town. The plaintiff's land had been rezoned by the city several years earlier but the developer had been unable to attract major tenants and had delayed the project. Although some work was done on the site, no real construction had occurred. At the time the second parcel was rezoned, the city manager announced that the rezoning of plaintiff's parcel had lapsed due to disuse in accordance with the normal zoning practice of the city. In fact, the plaintiff's rezoning had not lapsed because the rezoning ordinance had specifically stated it would not.

The plaintiff alleged a conspiracy to restrain trade and to monopolize the shopping center market in the region. The plaintiff also

60. This result offers a warning to plaintiffs' attorneys. It is possible to be found liable for damages in a counterclaim or for attorney's fees for bringing a frivolous lawsuit or one without merit. In *Tatum v. Regents of Nebraska-Lincoln*, 51 U.S.L.W. 3883 (June 13, 1983), the United States Supreme Court has recently assessed attorney's fees against a plaintiff for a frivolous appeal. This decision is likely to encourage lower courts to take similar action.

61. 671 F.2d at 1150.

62. See *infra* text accompanying notes 96-110.

63. 1982-2 Trade Cas. ¶ 64,931 (E.D. Mo. 1981), *aff'd in part and rev'd in part* 693 F.2d 733 (8th Cir. 1982).

claimed various improper secret contacts and agreements between the city, city officials and the other developers, including a trade of some of the developer's land in exchange for the rezoning. The district court granted the defendant's motions for summary judgment, holding that there was no evidence of monopolization or anti-competitive action, and no basis for the plaintiff to attempt to prove its allegations.

Concerning the antitrust immunity claim of the city, the district court held there was an exemption for the city under *Parker v. Brown* because the city ordinance was passed under a state enabling act. Unfortunately, although deciding the case in 1981, the district court made no reference to *City of Lafayette* or the other recent cases changing the antitrust exemption and did not apply the test developed in these cases. The district court also found the *Noerr-Pennington* immunity.

The Eighth Circuit Court of Appeals reversed the district court.⁶⁴ The court held that the plaintiffs alleged a conspiracy to thwart the normal zoning procedures of the city, and that such a conspiracy, if proved, would not further any articulated state policy. Further, the court decided there was no *Noerr-Pennington* immunity because the plaintiffs alleged not just petitioning of the government by the defendants but also that the defendants had engaged in illegal or fraudulent actions to revert the plaintiff's zoning.⁶⁵

Of course, the reversal does not find liability, but it does offer the plaintiff the chance to prove its claims in a situation where the plaintiff probably could not go ahead with the project due to its own problems.⁶⁶ The plaintiff did allege, however, that the city was acting in the marketplace.⁶⁷

In *Scott v. Sioux City*, the district court refused to grant summary judgment for the city on the basis of the exemption. The court read *City of Boulder* and *City of Lafayette* to require a state mandate for anti-competitive behavior, a clearly articulated and affirmatively expressed state policy and active supervision by the states of the local government's activities.⁶⁸ Lacking any of these elements, a defense of immunity must fail, according to the court. The decision appears to be

64. 693 F.2d 733 (8th Cir. 1982).

65. *Id.* at 746.

66. See 1982-2 Trade Cas. ¶ 64,931 at p. 72763.

67. 1983-1 Trade Cas. ¶ 65,352 (N.D. Iowa, 1983). This opinion concerns a defense that the redevelopment statutes of Iowa provide an exemption to the city, and so this case could appear in the next subpart of the article. The court followed a similar analysis on the question of zoning, however.

68. While the District Court found that active supervision by the state was required, the Eighth Circuit Court of Appeals in *Gold Cross Ambulance and Transfer and Stand-by Service v. City of Kansas City*, 705 F.2d 1005 (1983) and in *Central Iowa Refuse Systems v. Des Moines*

more demanding of a city and of state statutes than several of the other decisions which are analyzed in this part of the article. The court's decision to read the Supreme Court opinions to require a three element test before an exemption will be granted would sharply reduce the possibility of a city avoiding the pre-trial and trial expenses which are of major concern to municipalities. Thus, *Westborough Mall*, *Mason City* and *Sioux City* demonstrate that the local antitrust exemption will be interpreted narrowly in land use related situations. Where zoning ordinances depend upon a typical state enabling act, the requirement for exemption that there be a clearly articulated state policy against competition will not be satisfied. However, although a city will have to defend its actions, *Mason City* was able to do so based upon its master plan and reasonable zoning based criteria for decision.

Three of the other zoning cases allege that downzoning was carried out by the defendant city in violation of the antitrust laws. In *Stauffer v. Town of Grand Lake*,⁶⁹ the town rezoned the plaintiff's land from multi-family to single family. The plaintiff had challenged the action twice in state court but the cases had been dismissed. Despite that fact, the plaintiff was held to have stated a cause of action in federal court alleging a conspiracy to restrain and monopolize trade by preventing him from competing in the sales market for multi-family residential units.⁷⁰

In an interesting opinion, the court stated that the *Lafayette* test was improperly applied in the original *Mason City* trial court opinion, although both cases held that no exemption existed. The district court found that a state need only have authorized municipal action and need not have commanded the action to qualify for the exemption.⁷¹ The court found that the Colorado zoning statute, while quite similar to Iowa's, evidenced a state policy to displace competition and that the state had a sufficiently active role in supervising the policy. No detailed legislative authorization is needed for the city to act.⁷²

However, the court still held that no exemption existed. Although the *Lafayette* test was satisfied, the plaintiff had alleged that the city went beyond the scope of its immunity. The plaintiff claimed that city officials owned land benefitted by the rezoning which had injured him.

Metro Solid Waste Agency, 715 F.2d 419 (1983) has held that active state supervision is not required for a municipality to qualify for the exemption.

69. 1981-1 Trade Cas. ¶ 64,029 (D. Colo. 1980).

70. *Id.* at 76328-76331.

71. *Accord*, *Town of Hallie v. City of Eau Claire*, 700 F.2d 376 (7th Cir. 1983) at 381-382.

72. This holding is probably reversed by the United States Supreme Court's opinion in *Community Communications, Inc. v. City of Boulder*, 455 U.S. 40 (1982).

The court held that this conduct was not authorized or contemplated by the state legislature and was not immunized. Thus, while the city may have broad discretion to be anticompetitive in the zoning ordinance, it cannot claim an exemption if the zoning is for the economic benefit and individual interests of city officials.⁷³

The *Stauffer* case also holds that a wholly local business can affect interstate commerce, even indirectly, and will satisfy the Sherman Act requirement of injury to interstate commerce. In *Stauffer*, the interstate effects were on out of state purchasers of property and out of state financiers of the purchasers.

Nelson v. Utah County,⁷⁴ involves a similar issue of rezoning of land. In *Nelson*, the issues were resolved in a manner similar to that in *Stauffer*, to hold that a cause of action has been stated. As in *Stauffer*, the plaintiff alleged that defendant local officials benefitted directly from the rezoning.

The third downzoning case is *Brown v. Carr*,⁷⁵ involving the Washington, D.C. Zoning Commission and private parties. The district court allowed the case to proceed on the theory that a publicity campaign to change the zoning was merely a sham to hide a conspiracy under the Sherman Act. The court found that the conspiracy allegation took the case out of both the *Parker* exemption and the *Noerr-Pennington* immunity.

These three downzoning cases establish an important concept for local government antitrust immunity. In all three cases, the plaintiffs claimed that the rezoning decision was made for the benefit of individual city officials rather than for the benefit of the municipality. In *Stauffer*, the district court found immunity to exist for general zoning by the city, but allowed the case to proceed because of the existence of a claim of action for the benefit of individual officials. This article will argue that self-dealing should be one of only two bases for finding local government antitrust liability.⁷⁶ Further, the ordinances which reflect self-dealing should also be invalid as zoning ordinances.⁷⁷

73. A similar analysis can be found in *Cedar-Riverside Assoc. v. U.S.*, 459 F. Supp. 1290 (D. Minn. 1978), *aff'd on other grounds sub nom.*, *Cedar-Riverside Assoc. v. City of Minneapolis*, 606 F.2d 254 (8th Cir. 1979). See *infra* text accompanying notes 77-79. It is the argument of this article that antitrust liability should only be held against a municipality when private individuals or officials are individually benefitted by the city actions or when the city acts as a developer. See *infra* text accompanying notes 96-110.

74. 1978-1 Trade Cas. ¶ 62,128 (D. Utah 1977).

75. 1980-1 Trade Cas. ¶ 63,033 (D.D.C. 1979).

76. See *infra* text accompanying notes 96-110.

77. See J. GARDINER AND T. LYMAN, DECISIONS FOR SALE: CORRUPTION AND REFORM IN LAND USE AND BUILDING REGULATION (1978).

In *Ossler v. Village of Norridge*⁷⁸ plaintiff expended well over one million dollars to purchase land for a multiple family condominium project after consulting with local officials. The land was zoned single family, but plaintiff alleged he was assured by the members of the village board that it would be rezoned to allow the project. The board then refused to rezone the land after public opposition developed, and plaintiff lost the land through foreclosure. The rezoning later was granted to the mortgage lender. In a short opinion, the Court dismissed the antitrust claim on the merits, finding that there had been no allegation by plaintiff of anticompetitive motives or anticompetitive consequences. The Court failed to mention the local government exemption in the opinion. However, without a claim by plaintiff of self-dealing or action for the benefit of private individuals in the complaint, the decision is consistent with the analysis proposed in this article.

The final zoning case this article will review is an interesting one. In *Whitworth v. Perkins*,⁷⁹ the defendant was the town of Impact, Texas, a town formed for the purpose of selling liquor adjacent to dry Abilene and within dry Jackson County. The plaintiff's property was zoned as residential, although the plaintiff ran a food market. The plaintiff was refused the right to sell liquor on his property. He claimed that the town, the alderpeople, the town developer and others had conspired to violate the antitrust laws by limiting competition and by monopolization. The district court held the zoning ordinance to be valid and dismissed the antitrust challenge on the basis that a valid zoning ordinance limited the plaintiff's use, and that there was no illegal conspiracy. The circuit court reversed, finding:

The mere presence of the zoning ordinance does not necessarily insulate the defendants from antitrust liability where, as here, the plaintiff asserts that the enactment of the ordinance was itself a part of the alleged conspiracy to restrain trade.⁸⁰

The court continued that if the zoning ordinance was passed to carry out the conspiracy to control competition in the sale of liquor in Impact, and if a plaintiff can show that he was injured by the ordinance, then a cause of action has been stated even if the ordinance is valid. Writing prior to the *Lafayette* case, the court also found that no automatic antitrust exemption existed and that a cause of action could lie against the city, although it left that decision to the district court.

78. 557 F. Supp. 219 (N.D. Ill., 1983).

79. 559 F.2d 378 (5th Cir. 1977), *vacated and remanded*, 435 U.S. 992 (1978), *opin. reinstated*, 576 F.2d 696 (5th Cir. 1978).

80. 559 F.2d at 379.

Whitworth is significant for challengers of local land use controls because it finds that a valid ordinance can be part of an illegal conspiracy under the antitrust laws. However, self-dealing is the basis of the conspiracy and likely to be the only context in which such a finding could be made.⁸¹

B. Other Land Use Decisions

Land use regulation is accomplished by communities through urban redevelopment programs, capital improvement control systems and other non-zoning methods. This section will look at antitrust challenges to non-zoning land use regulation. There are four cases relating to redevelopment programs. In *Schiessle v. Stephens*,⁸² the redevelopment plan of the city of Rosemont called for the plaintiff's property to be "taken," although the property was used for several businesses. The plaintiff claimed that the plan was a "sham" and designed to allow her property to be taken to be sold to another developer as part of a conspiracy to restrain trade and monopolize trade. In a well reasoned opinion, the district court held that under *Lafayette* and related cases, there was no state action exemption. The existence of the plan was not enough to immunize the city if individual benefit was intended. This finding is consistent with the proposal in part III of this article.

A second case, *Cedar-Riverside Associates v. United States*,⁸³ concerned a reduction in the number of units a developer could build. Here, as in *Stauffer*, the court found that immunity would ordinarily result from a redevelopment plan change. However, the court held that the plaintiffs properly pleaded that Minneapolis exceeded its lawful monopoly by conspiring with a private party to restrain competition. Thus, the plaintiffs had stated a cause of action.⁸⁴ However, the court doubted that the plaintiffs could prove their case or ultimately prevail.⁸⁵

In *Jonnet Development Corp. v. Caliguri*,⁸⁶ a plaintiff alleged that the City of Pittsburgh, the Redevelopment Agency, public officials, Conrail and private developers conspired to prevent the construction of a potentially competing hotel outside the designated development area in which a hotel was planned. The court dismissed the case by finding

81. See *infra* text accompanying notes 96-110.

82. 525 F. Supp. 763 (N.D. Ill. 1981).

83. 459 F. Supp. 1290 (D. Minn. 1978), *aff'd on other grounds sub nom.* Cedar-Riverside Assoc. v. City of Minneapolis, 606 F.2d 254 (8th Cir. 1979).

84. *Id.* at 1299.

85. *Id.*

86. 558 F. Supp. 962 (W.D. Pa., 1983).

that the state legislation authorized anti-competitive behavior concerning land development.⁸⁷ The court found that the redevelopment process was "in furtherance of a clearly articulated policy of the Commonwealth of Pennsylvania, and private competition has been displaced."⁸⁸ Because the city was alleged only to be a regulator, the dismissal is proper under the proposal in Part III of the article.

Finally, in *Richmond Hilton Associates v. The City of Richmond*,⁸⁹ a competing developer sued the city and its officials for actively opposing a proposed hotel which would compete with the hotel planned for a major redevelopment project. Ultimately the case was settled without a court determination of the existence of an exemption. However, since the city was alleged only to be a regulator, a state action antitrust exemption would have been appropriately found by the court.

Another interesting case, properly decided, is *Miracle Mile Associates v. City of Rochester*.⁹⁰ The plaintiff proposed to build a shopping center in the town of Henrietta, New York, a suburb of Rochester. Rochester, in the process of developing a downtown shopping center, aggressively opposed the new center. As Rochester could not refuse to rezone or directly affect the decisions of its suburb, the city, either directly or through individuals, filed a series of requests with the New York Department of Environmental Conservation to apply the State Environmental Quality Review Act⁹¹ and the Freshwater Wetlands Act.⁹² Rochester also filed requests with the United States Army Corps of Engineers to force plaintiffs to comply with federal statutes.⁹³ The plaintiffs claimed that all the applications were part of a "sham," not to obtain the remedies requested, but to delay or block plaintiff's project.

Both the district court and the Second Circuit Court of Appeals agreed that the city's activities were exempt under the antitrust laws because the state and federal agencies did take jurisdiction and required plaintiffs to comply with the appropriate statutes. Also, Rochester had a strong interest in the economic health of its inner city, a valid police power justification for its actions.

The district court held that the plaintiffs' suit was frivolous, and

87. See 558 F. Supp. 962 at 965.

88. *Id.*

89. No. CA81-1100R (E.D. Va., 1981). For collateral opinions, see fn. 4, *supra*.

90. 1979-2 Trade Cas. ¶ 62,735 (W.D.N.Y. 1979), *aff'd in part and rev'd in part*, 617 F.2d 18 (2d Cir. 1980).

91. N.Y. ENVTL. CONSERV. LAW § 8 (McKinney Supp. 1982-83).

92. *Id.* at § 24.

93. *Miracle Mile Assoc. v. City of Rochester*, 1979-2 Trade Cas. ¶ 62,735 at 78148.

granted attorneys fees against plaintiff.⁹⁴ The Second Circuit reversed that finding, holding that even an unsuccessful court action, although similar to a previous unsuccessful court action, was not frivolous.⁹⁵

Thus, an aggressive city did not fall afoul the anti-trust laws, while a plaintiff who had lost a similar suit in the past did not suffer added liability either. As there was no claim of self-dealing by the officials of the city, and the city had valid police power reasons for its action, the decision is a correct one.

Finally, a group of cases relate to a municipality's use of its sewer system or other capital system to control land development. In *Parks v. Watson*,⁹⁶ the City of Klamath Falls, Oregon refused to vacate a platted city street to allow development of an apartment complex unless the developer deeded to the city land which contained geothermal wells. The developer alleged that the requirement that it dedicate the wells to the city was anti-competitive, because the city was developing geothermal resources and created the condition of dedication to eliminate a potential competitor. In reversing the district court's granting of summary judgment for the city, the Ninth Circuit Court of Appeals found that the state had not clearly authorized "monopolistic control" by the city.⁹⁷ Further, the court found that the city could not rely on an immunity claim because it had not created the special district authorized by the state legislature. Finally, even if a monopoly were authorized, the city might not be immunized for an improper tying of a "non-monopolized" product or service to the sale of the authorized product.⁹⁸

In *Vickery Manor Service Corporation v. Village of Mundelein*,⁹⁹ the plaintiffs were a privately owned sewage treatment facility and the owner of developable land within the village. The plaintiffs alleged that in order to get development permission for the land, the city would require the land developer to acquire the privately owned facility, upgrade it, abandon its use for the development when the city extended its service to the area, pay substantial fees to bear the cost of the sewer extension and hook-ups, and operate the facility at a loss to provide service to a small group of customers located outside the village. The district court held that the village's claim of immunity could not prevail. The court rejected the argument that the state had clearly articu-

94. *Id.* at 78151.

95. 617 F.2d at 21-22.

96. 1983-2 Trade Cas. ¶ 65,632 (9th Cir. 1983).

97. *Id.* at p. 69209.

98. *Id.*

99. No. 82 C 5392, (N.D. Ill. 1983).

lated and affirmatively expressed a policy allowing a municipality to create a monopoly over sewer service by tying land development permissions to the elimination of competitors. Instead, it found the relevant statutes to be neutral, authorizing sewage services but not anti-competitive activities.

Both *Parks* and *Vickery Manor* are consistent with the analysis and proposal offered in Part III of this article.¹⁰⁰ In both cases, the city was the owner of a public utility and was alleged to be a market place actor trying to use land development controls to enhance its market-place position. It is the thesis of this article that the antitrust laws should apply to municipalities acting as developers or property owners in the market place. However, when the municipality acts as a regulator, it should not be liable under the antitrust laws.

The latter situation existed in a third capital improvement case, *Unity Ventures v. County of Lake*.¹⁰¹ *Unity Ventures* is the second antitrust case against a municipality to go to trial, and the first case in which the local government lost at trial.¹⁰² The plaintiffs were attempting to develop a large tract of land originally under county jurisdiction. The development could only proceed after annexation to one of the cities located near the land. After extended negotiations, the developer chose to annex to the Village of Round Lake Park. Although their land was now a part of Round Lake Park, the developers discovered that a nearby village, named Grayslake, had a contract with Lake County, the county in which the property was located, to allow Grayslake to veto sewer connections from the developer's property to the county sewer system. Only the county sewer system could serve the development. Grayslake exercised its veto power, and successfully opposed plaintiff's application to the state for a permit to build its own sewage treatment facility. As a result, the development could not proceed and the Village of Grayslake preserved the sewage capacity for potential land developments within its boundaries.

In rejecting defendant's claim of municipal immunity, the court followed the *Vickery Manor* decision and found that the village was not expressly authorized to carry out the anti-competitive activity of protecting its own developable land at the expense of other communities.

100. See *infra* text accompanying notes 96-110.

101. No. 81 C 2745, (N.D. Ill.). The jury decision was rendered on Jan. 13, 1984. See Chicago Tribune, January 14, 1984, p.5 and February 2, 1984, Metropolitan Section, p. 7.

102. The jury granted 9.5 million dollars in damages, which were trebled to 28.5 million dollars. The defendants have filed a motion notwithstanding the verdict, and for a reduction in the amount of the damages. They are likely to appeal if neither of the motions are granted. Interview with Alan Mills, attorney for plaintiffs, Feb. 1, 1984.

Since the village lacked state authorization, it could not rely on a claim of immunity from the antitrust laws.¹⁰³ As a result, the court ordered the case to trial, which resulted in the jury's finding for plaintiffs.

This decision does not fit into the proposal for liability asserted in this article. While the village's actions perhaps should have been invalid as a land use control matter,¹⁰⁴ the city was acting as a regulator, not as an owner or for the benefit of specific individuals. As a result, the antitrust laws ought not be available against the community, although a challenge based on basic land use and equity principles would be appropriate.

To summarize the results of the litigation concerning the local antitrust exemption, several points seem to be established. There is still a state action exemption for local governments from the antitrust laws. However, the exemption is sharply limited compared to what it was believed to be a few years ago. Cities are being sued for many actions, including for their land use and zoning actions. The courts have now developed a test for antitrust immunity that is likely to allow many plaintiffs in land use related cases to avoid dismissal on immunity grounds. Only one case has actually found liability, however. The next part of this article will argue that cities should be able to defeat many actions through the exemption, and that cities are not violating the antitrust laws in most land use actions.¹⁰⁵ A plaintiff should have to allege that there are acts by the city or its officials to benefit city officials or private people, or that the city is a marketplace actor in order to overcome a claim of municipal antitrust exemption.

PART III

*Some Thoughts About When Antitrust Liability Should be Found*¹⁰⁶

This article has reviewed the recent antitrust challenges to local government zoning and land use decisions. The cases represent attacks on standard local land use decisions which usually are analyzed for validity under traditional police power concepts. In most cases, the local government is regulating private decisionmaking, sometimes by choos-

103. See Magistrate's Report and Recommendation, December 14, 1983.

104. See *supra* text accompanying notes 34-41.

105. See *infra* text accompanying notes 96-110.

106. It is not the purpose of this article to review the antitrust laws of the United States or to analyze the component concepts. The concepts are complicated and the literature analyzing the statutes and cases is extensive. Recent works reviewing the antitrust laws include E. KINTER, *FEDERAL ANTITRUST LAW* (1980); A. NEAL AND D. GOYDER, *THE ANTITRUST LAWS OF THE UNITED STATES OF AMERICA* (3d ed. 1980); J. VAN CISE AND LIFLAND, *UNDERSTANDING THE ANTITRUST LAWS* (8th ed. 1980); P. AREEDA AND D. TURNER, *ANTITRUST LAW* (1980).

ing among individual developers where all projects cannot or should not be authorized. Where traditional land use control decisions are made by the local government, the antitrust laws do not offer an appropriate framework for analyzing the validity of the local government police power decisions. When a city council decides that a particular parcel of land is best developed for residential rather than commercial purposes, or decides that single family rather than multi-family housing is more desirable for a site, it is making a judgment which should be based on the public health, safety and welfare of the community.¹⁰⁷ The decision should be based on the needs and desires of the residents of the community, expressed generally through the political decision process or particularly through the public hearing process required for virtually all significant land use control decisions.¹⁰⁸

In addition to the political aspect of the process, the decision should be based on the professional planning process which is utilized to varying degrees by municipalities all over the country.¹⁰⁹ The decision should recognize the goals of good planning and reflect fairness between the subject-site's permitted land use, similarly situated sites, and neighboring, affected uses of land.¹¹⁰

Of course, overriding national, state and regional needs and standards should be used to review and invalidate particular land use decisions and even the entire land use control schemes of communities. Racially and economically exclusionary ordinances should be overruled.¹¹¹ Environmentally destructive local decisions should be overturned.¹¹² Individual decisions which are irrational or unfair should be

107. This is the standard statement of the police power of the community. It was expressed as early as 1926 by the United States Supreme Court in *Village of Euclid v. Ambler Realty Co.*, 272 U.S. 365 (1926), in which the Court approved the concept of zoning. See 1 N. WILLIAMS, *AMERICAN LAND PLANNING LAW*, 177-92 (1974) [hereinafter cited as N. WILLIAMS].

108. A public hearing is required at least once during the consideration of zoning ordinance amendments, during the consideration of applications for variances or special exceptions, and for most applications for modern flexibility devices. The requirement was written into the Standard Zoning Enabling Act (United States Dept. of Commerce, 1926) which has been the basis for all state zoning enabling acts, and has been routinely required ever since. See 7 P. ROHAN, *ZONING AND LAND USE CONTROLS*, 51-46 through 51-56 (1981) [hereinafter cited as P. ROHAN].

109. See D. MANDELKER, *supra* note 35 at 49-66 and the books and articles cited therein. See also ELLICKSON AND TARLOCK, *supra* note 43 at 361-412; N. WILLIAMS *supra* note 97 at 20-26.

110. See ELLICKSON AND TARLOCK, *supra* note 43 at 363-69. See Kmiec, *Deregulating Land Use: An Alternative Free Enterprise Development System*, 130 U. PA. L. REV. 28, 40-46 (1981) [hereinafter cited as Kmiec].

111. The literature concerning exclusionary zoning is voluminous. Many of the leading works are cited in D. MANDELKER, *supra* note 35 at 221-23. See also 1 P. ROHAN, *supra* note 98 at 2-1 through 3-278.

112. The literature concerning environmental aspects of land use control is also extensive. Leading works are cited in D. MANDELKER, *supra* note 35 at 335. See also 4 P. ROHAN, *supra* note 98 at 24-1 through 28-127.

subject to challenge and should be voided by the courts.¹¹³

The present state of land use litigation is troublesome in many jurisdictions. Inconsistent and unfair decisions are made by local governments, often without challenge by property owners because of the costs of litigation and delay.¹¹⁴ Where challenges are made, a presumption of validity often protects the local decision where it ought to be invalidated.¹¹⁵ The list of persuasive criticisms of land use decisions and doctrines is long and disturbing. A major rethinking of important doctrines and practices of the land use control process is taking place, and is much needed.¹¹⁶

However, the antitrust laws do not provide a useful or appropriate context for the land use reforms which are needed. The antitrust laws ask a series of questions about economic decisionmaking, and the impact on markets or marketplace decisions. While local governments are economic actors in some aspect of their existence, the land use control process is one where the local government is acting not as an economic entity but as a regulator of the private decision process. The particular local government may be a good or bad regulator. Its decisions should be subject to review based on concepts of equity, due process and rationality appropriate for the regulatory function which it is carrying out. The framework for analysis for the antitrust laws does not fit the needs of such a review process. Thus, where the allegations of the plaintiff relate to regulatory activities, the antitrust laws should not apply. An exemption should be found by the court early in the process, to reduce the economic impact of the antitrust defense otherwise required.

However, the antitrust laws should be applied to two aspects of the local government land use control process because the regulatory function is not always carried out by a local government to the exclusion of market place activities. In some circumstances, local governments act as developers, or at least as partners of developers, in the land develop-

113. See generally ELLICKSON AND TARLOCK, *supra* note 43 at chs. 2 and 3. See also Kmiec, *supra* note 100 at 40-46.

114. See R. BABCOCK, *THE ZONING GAME*, at 89-100 (1966). See also B. SIEGAN, *LAND USE WITHOUT ZONING* at 17-18 (1972) [hereinafter cited as B. SIEGAN]; Thurow and Vranicar, *Procedural Reform of Local Land Use Regulation*, *LAND USE ISSUES OF THE 1980s* at 191-95 (J. Carr and E. Duensing ed. 1983).

115. See 4 R. ANDERSON, *supra* note 35 at § 25.26.

116. Recent extensive criticisms of the zoning system include B. SIEGAN, *supra* note 98; Ellickson, *Suburban Growth Controls: An Economic and Legal Analysis*, 86 *YALE L.J.* 385 (1977); Kmiec, *supra* note 94; Krasnowiecki, *Abolish Zoning*, 31 *SYRACUSE L. REV.* 719 (1980); C. Rose, *Planning and Dealing: Piecemeal Land Use Controls as a Problem of Local Legitimacy*, 71 *CAL. L. REV.* 837 (1983).

ment process.¹¹⁷ They become involved in the development or redevelopment of parts of the community, providing money and land use permissions as required. Sometimes, they own or receive a share of the profits of the enterprise in which they have participated. Where the city takes on the development role and exercise its land use powers as part of its development role, it is a market place actor. As such, it should be subject to the standards of behavior required by the antitrust laws.

Second, corruption, improper influence for the benefit of private individuals, and official's self-dealing unfortunately are endemic and epidemic in local government land use regulation.¹¹⁸ Indeed, an official's self-dealing or decision to benefit particular private individuals was alleged in several of the reviewed antitrust challenges.¹¹⁹ It was claimed that the public land use control process had been captured for private profit making and was not being exercised for the public welfare. The municipality had been turned into a private actor, protecting or providing assistance for the economic activities of particular individuals at the expense of other individuals. The local government actions were for the purpose of benefitting the individuals rather than for the purpose of protecting the general welfare.

It is these cases that appear most appropriate for antitrust challenges. Private economic goals are being pursued by the public entity, and being pursued inappropriately. Regardless of the apparent merit of the land use decision as a land use decision, the antitrust framework should be available to review the activities of the local government captured for private benefit.

Assuming that antitrust liability is found in one of these two circumstances, what should be the appropriate remedy? Ordinarily, treble damages as punitive damages are available to a successful antitrust plaintiff. However, it is not common to grant punitive damages against a municipality because of the burden placed on the taxpayers.¹²⁰ In the situation where the municipality's land use control decisions have been made for private benefit, however, punitive damages

117. See *Cedar-Riverside Assoc. v. U.S.*, 459 F. Supp. 1290 (D. Minn. 1978), *aff'd on other grounds sub nom. Cedar-Riverside Assoc. v. City of Minneapolis*, 606 F.2d 254 (8th Cir. 1979); *Parks v. Watson*, 1983-2 Trade Cas. ¶ 65, 632 (9th Cir. 1983).

118. See J. GARDINER AND T. LYMAN, DECISIONS FOR SALE: CORRUPTION AND REFORM IN LAND-USE AND BUILDING REGULATION (1978).

119. See, e.g., *Whitworth v. Perkins*, 559 F.2d 378 (5th Cir. 1977), *vacated and remanded*, 435 U.S. 992 (1978), *opin. reinstated*, 576 F.2d 696 (5th Cir. 1978); *Brown v. Carr*, 1980-1 Trade Cas. ¶ 63,033 (D.D.C. 1979); *Nelson v. Utah County*, 1978-1 Trade Cas. ¶ 62,128 (D.D.C. 1979); *Stauffer v. Town of Grand Lake*, 1981-1 Trade Cas. ¶ 64,029 (D. Colo. 1980).

120. *The United States Supreme Court in County of Newport v. Fact Concerts Inc.*, 453 U.S.

ought to be granted because the exercise of police power for private gain represents a substantial abuse of power.

Treble damages should not be granted where the local government acts as a developer. The activity is for a public purpose and benefit even if tactics chosen may violate the antitrust laws. As a result, the injured party should be limited to recovery of actual damages. Where the violations of the antitrust laws include self-dealing as well, however, treble damages should be granted.

IV. CONCLUSION

Although antitrust causes of action have been asserted for a variety of zoning and planning decisions, the antitrust laws are not appropriate for testing the validity of most land use decisions. Instead, police power principles, modified to eliminate some of the existing flaws and inequities, should test local land use decisions.

For most land use related antitrust litigation, where the challenge is to the community's regulatory activities, the court should recognize the *Parker v. Brown* exemption early in the litigation process. By granting an early motion to dismiss, the court will allow the municipality to avoid most of the expenses of defending an antitrust action. Only where the municipality is alleged to be acting as a development partner, or acting for the economic benefit of government officials or private individuals, should the lawsuit proceed and the antitrust laws be applicable. Even where antitrust laws are applicable and are found to have been violated, only in the case of official self-dealing or municipal action for the benefit of private individuals should traditional treble damages be imposed on municipalities.

247 (1981) refused to authorize punitive damages against a municipality under 42 U.S.C. § 1983. The Court stated:

By the time Congress enacted . . . § 1983, the immunity of a municipal corporation from punitive damages at common law was not open to serious question. It was generally understood by 1871 that a municipality . . . was . . . subject to suit for a wide range of tortious activity, but this understanding did not extend to the award of punitive or exemplary damages . . . Judicial disinclination to award punitive damages against a municipality has persisted to the present day in the vast majority of jurisdictions.

Id. at 259-60 (footnotes omitted).

Of course, it may take an amendment to the antitrust laws to avoid treble damages against municipalities, given the present language of the damages provision.